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Workmen's Compensation -- Injury from Blood Test Required by Public Regulation

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Workmen's Compensation—Injury from Blood Test Required by Public Regulation

In the case of *King v. Arthur*,[1] an unsuccessful attempt to draw blood from claimant-dairy worker's arm for a Wasserman test caused a draining lesion which incapacitated her for two months. Claimant's employer had ordered her, during working hours, to submit to the test at a specified clinic. No deduction from her pay was made for the time she was away from her work. A county health ordinance required dairy workers to submit to blood tests every six months. Employer-defendant was required to see that his employees took the test or his dairy would be subject to "immediate degrading, suspension of permit"[2] and he could be found guilty of a misdemeanor and upon conviction, subject to fine or imprisonment.[3] In denying compensation, the court reversed the deputy commissioner, the full commission, and the superior court.

The basis for the court's decision was that claimant, in submitting to the test, was obeying, not a requirement of the employer, but of the public. For this reason her injury did not "arise out of and in the course of the employment."[4] In deciding this question of first impression in North Carolina, the court relied primarily on the following two cases from other jurisdictions.

In *Krout v. J. L. Hudson Co.*,[5] claimant-factory worker's disablement followed a smallpox vaccination given by the board of health as part of a general anti-epidemic program. Defendant-employer had cooperated with the board by communicating its request for submission of all employees to the vaccinations and by excluding unvaccinated employees from the factory for a twenty-one day safety period. The court concluded that the injury, if traceable to the vaccination, arose, not out of the employment, but out of the active agency of the board which had requested claimant's submission to the vaccination for her own benefit as well as for the benefit of the general public. The *Krout* and

[1] 245 N. C. 599, 96 S. E. 2d 847 (1957).

[2] U. S. PUBLIC HEALTH SERVICE STANDARD MILK ORDINANCE AND CODE WITH REVISIONS UPWARD § 5 (adopted by the County Board of Health of Buncombe County).

[3] N. C. GEN. STAT. § 130-20 (1952).

[4] See Roberts v. U. S. O. Camp Shows, 91 Cal. App. 2d 884, 205 P. 2d 1116 (1949); Smith v. Brown Paper Mill Co., 152 So. 700 (La. App. 1934); Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N. W. 438 (1930); Sanders v. Children's Aid Soc'y, 262 N. Y. 655, 188 N. E. 107 (1933); Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421, 188 N. E. 870 (1934); Alewine v. Tobin Quarries, Inc., 206 S. C. 103, 33 S. E. 2d 81 (1945); Texas Employers' Ins. Ass'n v. Mitchell, 27 S. W. 2d 600 (Tex. Civ. App. 1930). In these cases injury resulted from vaccinations or blood tests performed by the employer's physician or nurse. Compensation was allowed on a finding that the employer required the injection, even though it had been requested or recommended by the board of health.

[5] 200 Mich. 287, 166 N.W. 848 (1918).

King cases here differ, because in *King* claimant was not an intended beneficiary of the blood test.

In *Industrial Comm'n v. Messinger*,[6] a five to two decision, the facts were more nearly the same. The restauranteur-employer, under compulsion of law, directed waitress-claimant to obtain the blood test which caused the injury. Two significant differences appear in this case: a) claimant was not ordered to go to any particular place to have the test but rather went to a physician of her own choosing; and b) the test was made when claimant was off work. The basis for the majority's decision was the same as that of the court in the *King* case.

The differences mentioned tend to lessen the persuasiveness of the cited cases as authority for the holding of the court in the principal case. In support of the court's decision, however, lies the theory that the employer in implementing statutory requirements acts merely as the agent of the governing body.[7] For this reason, justice would seem to demand that he not be made to pay for resulting injuries as he would be if he had ordered the injury-producing act in the exercise of his unfettered discretion.[8] Also it might be argued that charging employers for injuries arising out of statutory requirements would tend to discourage ventures into heavily regulated areas of industry. But considering the circumstances of the principal case and the philosophy and purpose of the Workmen's Compensation Act, it is felt that the result reached in the *King* case is unduly harsh.[9]

Schneider has said that "an accident arises from the employment if it ensues from a risk reasonably incident to the employment"; he further states that the risk may be one only indirectly connected with the employment.[10] Our court has said the injury "must in some reasonable

[6] 116 Colo. 451, 181 P. 2d 816 (1947).

[7] See Texas Employers' Ins. Ass'n v. Mitchell, 27 S. W. 2d 600 (Tex. Civ. App. 1930).

[8] This argument is akin to that advanced in the old "compulsory pilot" cases. In these cases the issue was whether ship owners should be held liable under respondeat superior for collision damage caused by the negligence of pilots whom the ship masters were compelled by law to accept. The owners successfully contended that it was unjust to hold them since they were allowed no choice in the matter. Dampskibsselskabet Atalanta A/S v. United States, 31 F. 2d 961 (5th Cir. 1929); Homer Ramsdell Transp. Co. v. La Com. Gen. Transatlantique, 182 U. S. 406 (1901), 4 TUL. L. REV. 133 (1929). These cases presented a problem analogous to that of the principal case, *viz.*, what degree of public interference makes it proper to take the affected aspect of a business out of the business for the purpose of determining entrepreneur liability? The magnitude of public usurpation of the owners' control in the pilot cases is obviously far greater than that occasioned by the blood test ordinance of the principal case.

[9] A generally accepted rule applicable to all cases arising under workmen's compensation laws was set out in Alewine v. Tobin Quarries, Inc., 206 S. C. 103, 110, 33 S. E. 2d 81, 83-84 (1945); "[W]e must keep in mind the established rule that the Act should be given a liberal construction in furtherance of the purposes for which it was designed . . . ."

[10] 6 SCHNEIDER, WORKMEN'S COMPENSATION § 1542 (d) (1948).

sense spring from and be traceable to the employment."[11] The above language is considered especially pertinent to the circumstances surrounding claimant's injury in this case. She was required by the law and by her employer to submit to a blood test every six months. The reasons therefor make her injury "traceable" to the employment and the risk of such injury "reasonably incident" to her employment. The county, through the ordinance, did not seek to discover or prevent disease in dairy workers for the benefit of the workers. The purpose of the regulation was to minimize the possibility that dairies would endanger the health of those who drank their milk. Thus the relationship between the blood test and the employer's milk would seem to supply the requisite connection between the injury and the employment.

Another aspect of the case and one which courts have frequently turned to in deciding the compensation question is: Who benefited from the act which produced the injury?[12] In the *King* case, the blood test was required out of concern over the possibility that the employer's milk might become a disease carrier. The direct beneficiaries were the customers of dairymen who carried out the mandates of the ordinance. Any benefit realized by an employee from the test was only incidental to the purpose of the law. Two benefits accruing to the employer from a measure aimed at keeping his product free from disease germs are readily seen: freedom from lawsuits and uninterrupted production. It would seem that the order was at least "calculated to further . . . indirectly, the master's business"[13] and this is no less true because compelled by law.

The philosophy behind the Compensation Act would also seem to point to compensation in this case. That philosophy is that the financial burdens of industry-connected injuries should be added, like any other production expense, to the cost of a particular industry's product and paid for by the product's consumers.[14] The blood test submitted to by the claimant was an integral part of the process of putting wholesome milk in the hands of consumers. In accordance with the act's philosophy,

[11] Vause v. Vause Equipment Co., 233 N. C. 88, 92, 63 S. E. 2d 173, 176 (1951).

[12] In Hildebrand v. McDowell Furniture Co., 212 N. C. 100, 109, 193 S. E. 294, 301 (1937), it was said that the phrase "out of and in the course of the employment embraces . . . those accidents which happen to a servant while he is engaged in the discharge of some function or duty . . . which is calculated to further, directly or indirectly, the master's business."

[13] See note 12 *supra*.

[14] This philosophy was set out in Vause v. Vause Equipment Co., 233 N. C. 88, 92, 63 S. E. 2d 173, 176 (1951), quoting from Cox v. Kansas City Refining Co., 108 Kan. 320, 322, 195 Pac. 863, 865 (1921), as follows: "[T]he wear and tear of human beings in modern industry should be charged to the industry .... And while such compensation is presumably charged to the industry . . . eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products."

it might be contended that injury resulting therefrom should ultimately be paid for by the consumers regardless of what compelled this particular part of the process.

A search of the cases and other authorities has revealed no instance, with the exception of the *Krout, Messinger,* and *King* cases, where an employer has defended on the grounds that an order of his was in fact a public order; and, as shown, these three cases are confined to the area of needle injections of some sort. In view of the great amount of public regulation of industries, especially those in the food and drug field, a question is raised as to the infrequent use of the defense. The *King* case could induce greater reliance on it in the future. In North Carolina the regulation of dairies is left in large degree to local authorities[15] and state agencies.[16] Bakeries are regulated in greater detail by the legislature[17]—even to the point of prescribing when employees shall wash their hands.[18] Many of these regulations could conceivably result in employee injury. If a bakery worker scalds his hands while complying with the clean hands requirement, would a denial of compensation be upheld on the basis of the *King* decision?

If an employer chooses to engage in a business which by its nature requires public regulation to make the business safe for his customers and the public in general, it is felt that he, and ultimately his customers, should bear any extra expense occasioned by such regulation. For this reason it is hoped that the rule in the *King* case will be confined to its facts and will not be invoked to deny compensation in other cases where the employer's orders and public regulation coincide.

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[15] N. C. GEN. STAT. § 130-19 (1952).
[16] N. C. GEN. STAT. § 106-267 (1952) (Board of Agriculture); N. C. GEN. STAT. § 130-4 (1952) (Board of Health); N. C. GEN. STAT. § 106-266.8(c) (Supp. 1955) (Milk Commission).
[17] See N. C. GEN. STAT. §§ 106-220 through 106-222 (1952).
[18] N. C. GEN. STAT. § 106-222 (1952).